

**DECISION**



*R. J. man*  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548  
*PL II*  
**7589**

**FILE: B-191665**

**DATE: September 11, 1978**

**MATTER OF: Air, Inc.**

**DIGEST:**

1. Protest based upon failure of competitors' items to meet specification, first discovered after an examination of parts breakdown of competitors' products, is timely filed, where protest is filed within 10 days after protester learned of alleged defects.
2. Drafting of specifications to meet Government's minimum needs and determination whether items offered meet specifications are functions of procuring agency. However, GAO will determine whether the procuring agency's interpretation of specification is reasonable.
3. Procuring agency's interpretation of specification, which does not require that trigger valve and 'O' rings of needle scaler conform to a particular design, is reasonable. Nevertheless, GAO recommends specification be clarified to more clearly state agency's intent.

Air, Inc. protests the award of a contract for pneumatic needle scalers under invitation for bids (IFB) FTAP-B5-10006-A issued by the General Services Administration (GSA). The IFB solicited bids for pneumatic, hydraulic and swaging tools. Items 61 and 62, added by an amendment to the IFB, called for pneumatic needle scalers, devices used for cleaning ship hulls during repair and overhaul. Because the protest concerns the Navy's Qualified Products List (QPL) for these items and the applicable military specification, MIL-S-23492B, the Navy submitted a report responding to the merits of Air's protest.

Essentially, Air contends that the products of those firms whose scalers are listed on the QPL, and which submitted bids for this procurement, do not comply with paragraph 3.11 of military specification, MIL-S-23492B. After an extensive review of the parts breakdown of each of these tools, Air found that the listed tools fail to conform to paragraph 3.11 which requires, "the valve trigger shall be fitted with 'O' rings or gaskets and prevent air leakage in either the open or closed position of the throttle valve."

Both GSA and the Navy contend that Air's protest is untimely. GSA characterizes Air's protest as one against the inclusion of the QPL requirement in the IFB. Therefore, GSA concludes that the protest should have been filed before bid opening in accordance with section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1977). The Navy contends that, "According to 4 C.F.R. 20.2(b)(1) protests based upon alleged improprieties which are apparent preceding bid opening should be filed prior to such time." In its view, "Air was certainly in a position to have obtained and disassembled its competitors products and/or conducted any testing required in time to protest before bid opening."

The record indicates that the Navy rejected Air's needle scalers for inclusion on the QPL in late January 1978. Air then decided to analyze the competing products to determine what design changes would be necessary to qualify its product. Air states that during the week of April 7 it discovered that the "'qualified' tools" did not have a trigger valve fitted with 'O' rings or gaskets to prevent air leakage with the throttle in the open position. Even though the protest was filed on April 11, 7 days after bid opening, Air argues that it is timely because it was filed within 4 days of the date the basis of the protest was discovered.

We cannot conclude that Air's protest was untimely filed. Contrary to GSA's position, Air's protest does not involve the inclusion of the QPL in the solicitation and does not, therefore, fall within section 20.2(b)(1)

of our Bid Protest Procedures. Moreover, regarding the Navy's rationale, section 20.2(b)(1) is not concerned with "alleged improprieties apparent preceding bid opening" but with alleged improprieties in the solicitation. Air's protest concerns the failure of those firms which bid on this procurement and whose products previously had been qualified by the Navy to meet a specification requirement necessary for product qualification. Air first learned of its basis for protest "while making comparisons with competitive tools." Such action was prompted by its rejection for listing on the QPL by the Navy. We have no reason to conclude that the protester failed to proceed expeditiously with its comparison of the tools. Section 20.2(b)(2) of our Bid Protest Procedures provides that protests must be filed within 10 days after the basis for protest is known. Inasmuch as Air protested within 10 days of its discovery of the alleged defect in its competitors' needle scalers, we cannot conclude that Air's protest is untimely.

As noted, paragraph 3.11 of MIL-S-23492B requires the valve trigger of the needle scaler be fitted with 'O' rings or gaskets to prevent air leakage in either the open or closed throttle valve positions. It is Air's contention that none of its competitors' products are fitted with 'O' rings to prevent air leakage in the open position.

As the Navy correctly points out, the drafting of specifications to meet the Government's minimum needs and the determination whether the items offered meet the specifications are properly the functions of the procuring agency. 50 Comp. Gen. 193, 199 (1970). However, while the instant protest concerns whether the qualified needle scalers meet the specifications, the crux of the protest centers around the interpretation of paragraph 3.11 of the specification. Resolution of this issue requires a determination by our Office as to whether the procuring agency's interpretation of the specification is reasonable. See Paul H. Werres Company, Inc., B-182141, December 26, 1974, 74-2 CPD 388.

We believe that Air has misinterpreted paragraph 3.11. As we read the military specification, the Navy does not mean to require that the trigger valve conform

to a specific design, i.e., that it be fitted with any particular 'O' ring configuration, or necessarily, with 'O' rings, to prevent leakage in both the open and closed positions. The specification is literally met if the trigger valve is fitted with 'O' rings or gaskets as necessary to ensure proper valve operation by preventing air leakage. We agree with the Navy that the thrust of the specification is to require adequate protection against excessive air leakage and that paragraph 3.11 does not of itself define what amount of air leakage would be acceptable with the throttle in the open, closed or an intermediate position.

In this regard, the Navy reports that "all of the scalers that the approved manufacturers submitted were disassembled during testing and found to have 'O' rings." The Navy emphasizes that all of the scalers meet the parameters of air leakage as defined in paragraph 4.6.4 of the specification:

"4.6.4 Air leakage test. Scalers shall be tested for tightness. Scalers shall be connected to a system consisting of a 0.25 cubic foot air receiver, valving as necessary and a 0 to 300 lb/in<sup>2</sup> range pressure gage. System shall be pressurized with air or nitrogen to a gage pressure of 150 lb/in<sup>2</sup> with throttle in the closed position and isolated for a period of 15 minutes. At the end of 15 minutes, maximum pressure drop permitted shall be no more than 50 lb/in<sup>2</sup>."

Consistent with the Navy's interpretation of the specification, the Navy does not state that any of the qualified scalers have an 'O' ring to prevent air leakage with the throttle in the open position. Rather, the Navy reports that each needle scaler complies with the air consumption and operating efficiency requirements of the specification thus precluding the possibility of excessive air leakage with the throttle valve in the open position. Based on the record, we believe

that the Navy's determination that the needle scalers of the qualified manufacturers meet the intent of the specification is reasonable. State Equipment Division of Secorp National, Inc., 55 Comp. Gen. 1467, 1471 (1976), 76-2 CPD 270.

While we agree with the Navy's interpretation of the specification, we recommend that paragraph 3.11 of the specification be studied by the Navy with a view toward making it more clearly state the Navy's intent.

Accordingly, the protest is denied.

*W. F. K. 11/12*  
Deputy Comptroller General  
of the United States



COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20548

*R. Feldman*  
*PL 2*

IN REPLY  
REFER TO: B-191665

September 11, 1970

The Honorable W. Graham Claytor  
The Secretary of the Navy

Dear Mr. Secretary:

Enclosed is a copy of our decision of today denying the protest of Air, Inc. against the award of a contract under Invitation for Bids (IFB) FTAP-B5-10006-A issued by the General Services Administration. We requested a report on the protest from the Navy because the IFB solicited bids for pneumatic needle scalers under military specification MIL-S-23492B. We are bringing this matter to your attention in view of our recommendation that the Navy clarify the language of paragraph 3.11 of MIL-S-23492B. We would appreciate being informed of the action taken in this regard.

Sincerely yours,

*R. Feldman*  
Deputy Comptroller General  
of the United States

Enclosure

cc: Vice Admiral G. R. Bryan  
Commander, Naval Sea Systems Command

The Honorable Allie B. Latimer  
General Counsel  
General Services Administration